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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 593

VITO GRIMALDI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Division, entered in the above entitled case on June 15, 1970.

A. Opinions Below

There were no opinions rendered by any of the Courts of the State of New York in connection with the proceedings in this case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, Second Judicial Department made on June 15, 1970 as aforesaid, and annexed hereto as Appendix A.

C. Questions Presented for Review

1. Does it violate the constitutional right to the assistance of counsel to deny a witness whose presence before a Grand Jury is compelled by subpoena, the right to have his counsel physically present with him in the Grand Jury room in order to protect his legal rights when he is being interrogated therein?

2. Does it violate the constitutional right of the petitioner when he is not advised of the proper scope of immunity and the crimes he can be prosecuted for even after immunity is conferred?

3. Does it violate the petitioner's right against self-incrimination when he is indicted for criminal contempt before he has had an opportunity to purge himself of the judgment for summary contempt?

D. Constitutional Provisions and Statute Involved

The constitutional provisions involved herein are those portions of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution relating respectively to the privilege against self-incrimination, to the right to the assistance of counsel and to due process of law.

The statute involved is Section 750 of The New York Judiciary Law dealing with punishment for contempt of Court in refusing to answer lawful interrogatories.

Pertinent parts of each of the foregoing is set forth verbatim in this petition as Appendices C, D, E, and F respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

The petitioner, Vito Gravallese, had been subpoenaed to appear before the Grand Jury in Kings County to give testimony. After a number of adjournments he appeared before the Grand Jury on January 8, 1970 and January 22, 1970. On January 8th he was advised of his rights to counsel outside the Grand Jury, to refuse to answer on the ground of self-incrimination, and that if he did so he could be granted immunity by the Grand Jury and the extent of that immunity. In this same session he was excused and the Grand Jury voted him immunity. The District Attorney then purported to advise him of the extent of this immunity in the following language:

> "In other words, if you testify to a question, your answers can never be used against you in any future criminal proceeding in any court of law. If you admit, for instance, to a burglary, and were questioned about this event here, and you admitted you caused the burglary, you can never be prosecuted for that crime. That is the law in New York State as of today.
>
> Q. Do you understand that you can never be arrested for that crime? Do you understand that?"

He was thereafter granted an adjournment to January 22, 1970 when he returned. He was once again asked certain

introductory questions and in furtherance thereof he was told he could not be prosecuted for crime in the State of New York. When he reasserted his Fifth Amendment privilege he was told that there were two crimes he could be convicted of even with the granting of immunity. The two crimes he was told of were civil or criminal contempt. When he adhered to his position he was excused. An order to show cause was brought to punish him for summary contempt. In opposition thereto the arguments were raised that he did not have counsel in the Grand Jury and that the advice of immunity was inadequate. Further, it was contended that the advice of what crimes he could be punished for even with the grant of immunity was also inadequate, since possible prosecution for perjury was omitted. All of these contentions were overruled and he was adjudged in contempt and sentenced to thirty (30) days' imprisonment and a $250 fine, or in lieu thereof to serve an additional thirty (30) days in jail.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Pending the determination of that appeal that Court stayed execution of the order below adjudging petitioner in contempt and imposing the aforesaid jail sentence and money fine.

Thereafter, on June 15, 1970, the contempt adjudication was affirmed without opinion by the Appellate Division.

Thereafter, an application was made to the Court of Appeals of the State of New York for leave to appeal to that Court. That application was denied on July 6, 1970. An application for a stay of the commitment order pending the filing of the petition for certiorari was denied by the

New York Court of Appeals. While the appeal was pending before the Appellate Division the petitioner was indicted for criminal contempt. The basis of this indictment was his failure to testify before the Grand Jury on January 22, 1970. It was contended on the application to the New York Court of Appeals that this prevented the petitioner from purging himself of the summary contempt. The basis for this contention was that if he elected to purge himself he would be incriminating himself of the charge contained in the criminal contempt indictment. This argument was rejected.

Thereafter, an application for a further stay of the commitment order was timely made to the Hon. John M. Harlan, an Associate Justice of this Court. On July 29, 1970 Mr. Justice Harlan granted such a stay upon condition that this petition be filed in this Court on or before August 26, 1970. Mr. Justice Harlan endorsed on the application the following:

> "In light of the pendency for argument next term of No. 97, *Piccirillo* v. *New York*, I am constrained to grant a stay, conditioned however as provided in the order I am signing today. JMH 7/29/70".

F. Argument Amplifying the Reasons Relied on for Allowance of the Writ

POINT ONE

It was a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The constitutional right to the assistance of counsel has been greatly enlarged in recent years. More significantly, this Court has upheld the right to counsel in various critical situations apart from an actual trial (*Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *U. S.* v. *Wade*, 388 U.S. 218 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1968); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

See also, Meshbesher, *Right of Counsel Before Grand Jury*, 41 F.R.D. 189.

The basic reason for denial by State Courts of the right to counsel inside the Grand Jury room is the desire to preserve the secrecy of the proceedings. More specifically, this desire for secrecy is generally sought to be bolstered by corollary propositions:

1. To prevent escape by prospective defendants.
2. To prevent prospective defendants or others from seeking to importune grand jurors.
3. To prevent tampering with witnesses.
4. To encourage witnesses to testify uninhibitedly without fear of disclosure.

5. To protect the prospective defendant from disclosure to others of the existence of an investigation directed toward him.

See, *U. S.* v. *Procter and Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958); *U. S.* v. *Rose*, 215 F.2d 617, 628-629 (3 Cir., 1954).

None of these reasons would be applicable to the case at bar. The first three reasons are predicated upon the assumption that the prospective defendant is unaware of the Grand Jury proceedings. Such reasons are hardly supportable where, as here, the petitioner was brought before the Grand Jury under compulsion of subpoena by the prosecutor himself.

The fourth reason relates to keeping secret the identity and testimony of witnesses other than the petitioner. Such secrecy would be unaffected by the appearance of the petitioner.

The fifth reason contemplates improper disclosure of the proceedings by members of the Grand Jury or the prosecutor or other persons apart from the petitioner. New York Law does not prohibit a witness before a Grand Jury from disclosing the fact that he testified or the testimony given by him (*People* v. *Minet*, 296 N.Y. 315).

Thus, once a witness is brought before a Grand Jury, all of the reasons underlying the need for secrecy necessarily become meaningless *as to him*.

If we are correct in that aspect, it would also follow that the physical presence of his counsel in the Grand Jury room simultaneously with him would in no way prejudice the secrecy requirements. What is known to the

witness must be made known to his counsel. This would be particularly true where, as in this case, the witness' presence was secured by the compulsory force of a subpoena.

The right to the physical presence of counsel in the Grand Jury room does not appear to have been directly considered by this Court. But see, *In re Groban*, 352 U.S. 330 (1957) and *Anonymous v. Baker*, 360 U.S. 287 (1959).

In re Groban, this Court held valid an Ohio statute authorizing a Fire Marshal's right to exclude counsel's presence when questioning a witness at an investigatory proceeding to determine the cause of a fire. Analogy was drawn between the right to counsel before a Grand Jury and before "other investigatory bodies" (*id.* at p. 333). The Court noted that the right to counsel was not constitutionally mandated in either situation.

In *Anonymous v. Baker*, this Court, drawing the same analogy, held that a Court ordered secret inquiry into unethical practices by attorneys did not constitutionally mandate a witness' right to have counsel present when being interrogated.

As indicated, *Baker* and *Groban* did not directly reach the issue raised herein. Nonetheless, while the language of those cases would appear to militate against petitioner's position herein, it might also be respectfully noted that they precede in point of time the entire series of Sixth Amendment opinions promulgated by this Court during the past decade.

We, therefore, respectfully urge that the issue herein raised squarely for the first time be considered by this Court.

POINT TWO

It was a deprivation of petitioner's constitutional right to fail to grant him the required immunity and properly advise him of the extent of prosecution he was liable to.

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> ". . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

Examination of the statute clearly indicates that it grants the constitutionally required "transactional immunity." *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

The immunity conferred herein is contained in minutes of the proceedings on January 8, 1970. The language used falls short of the statutory and judicial require-

POINT THREE

It was a violation of the petitioner's rights under the Fifth Amendment to indict him for criminal contempt before he had exhausted all his appeals from the judgment of summary contempt.

It is submitted that since his legal arguments against testifying before the Grand Jury have been overruled, should he now wish to purge himself of the summary contempt he is prevented from doing so. He is prevented from doing so by virtue of the indictment. For should he testify, in an endeavor to purge himself, he is admitting

a. That the Grand Jury investigation is relevant.

b. That he has information pertinent to that investigation.

c. That his failure to testify was willful and intentional.

These are all necessary elements that the prosecution would have to prove in order to convict him of the contempt for which he was intlicted.

Thus, it is submitted that his position is not dissimilar from the position faced by the defendants in the gambling stamp tax cases, viz., *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968). Nor is it dissimilar from the position in the gun licensing cases, viz., *Haynes* v. *United States*, 390 U.S. 85 (1968) or the marijuana cases, *Leary* v. *United States*, 395 U.S. 6.

In order for Grimaldi to comply with the Judge's order to testify, he must now incriminate himself by giving testimony which will convict him of the crime charged in the pending indictment.

CONCLUSION

The Writ of Certiorari herein prayed for should be granted.

Respectfully submitted;

EISEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, Esq.
Of Counsel

APPENDIX A

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department Affirming Order Below

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 15, 1970.

HON. SAMUEL RABIN,
Acting Presiding Justice,

HON. JAMES D. HOPKINS,
HON. FRED J. MUNDER,
HON. M. HENRY MARTUSCELLO,
HON. ARTHUR D. BRENNAN,
Associate Justices.

In the Matter of

EUGENE GOLD, District Attorney of the County of Kings,

Respondent,

—v.—

VITO GRIMALDI,

Appellant.

ORDER ON APPEAL FROM ORDER

In the above entitled cause, the above named Vito Grimaldi, a party, having appealed to this court from an order of the Supreme Court Kings County, dated April 30, 1970; and the said appeal having been argued by William Sonenshine, Esq., of counsel for the appellant, and submitted by Irving P. Seidman and David H. Katz, Esqs., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, without costs.

Enter:

HERMAN M. POGUE
Clerk of the Appellate Division

—— A D 2d —— A—May 26, 1970

1088 E. In the Matter of Eugene Gold, District Attorney of the County of Kings, respondent, v. Vito Grimaldi, appellant.

1088 E.

Order of the Supreme Court, Kings County, dated April 30, 1970, affirmed, without costs. No opinion.

RABIN, Acting P.J., HOPKINS, MUNDER, MARTUSCELLO and BRENNAN, JJ., concur.

APPENDIX B

Order of the Supreme Court of the State of New York, County of Kings, Adjudging Petitioner in Contempt of Court

At a Criminal Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, Civic Center, Borough of Brooklyn, City of New York, on the 30th day of April, 1970.

Present:

HON. JULIUS HELFAND,

Justice.

In the Matter of the Application

of

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN ORDER DIRECTING

VITO GRIMALDI,

A WITNESS BEFORE A KINGS COUNTY GRAND JURY TO RETURN TO THE GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES OR IN THE EVENT THE WITNESS SHOULD REFUSE TO OBEY SAID DIRECTION PUNISHING THE WITNESS FOR A CRIMINAL CONTEMPT FOR A WILFUL, CONTUMACIOUS AND UNLAWFUL REFUSAL TO OBEY A DIRECTION OF THIS COURT TO RETURN TO SAID GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES

It appearing to the satisfaction of this Court that at the May 1968 Term of this Court, Part I thereof, a 4th additional Grand Jury for the County of Kings and for the Court was duly impaneled, and that the said Term of the Court and of the said Grand Jury has been duly extended to May 29, 1970, and that the said Grand Jury was and is now duly in existence;

And it further appearing to the satisfaction of this Court that the said Grand Jury was and is lawfully in session and was and is investigating to determine whether there existed in the County of Kings a criminal conspiracy, to commit the crime of murder, and other related crimes in an effort to succeed one Joseph Bonanno as head of an organized crime syndicate in Kings County.

And it further appearing to the satisfaction of this Court that the Police Department of the City of New York and the District Attorney of Kings County, have obtained information which alleges and indicates that the crime of conspiracy to commit murder, and other related crimes have been committed in Kings County as part of an internecine struggle to succeed Joseph Bonanno as head of an organized crime syndicate in Kings County;

And it further appearing to the satisfaction of this Court that the witness above named, duly appeared as a witness before the Grand Jury and said investigation on the 22nd day of January, 1970 and said witness was thereupon duly sworn to tell the truth;

And it further appearing to the satisfaction of the Court that the said witness had refused to answer any questions put to him before the said Grand Jury upon the ground that his answer might incriminate him;

And it further appearing to the satisfaction of this Court that thereupon in the form and manner provided by law, immunity from the prosecution was duly conferred upon the witness;

And it further appearing to the satisfaction of this Court that thereafter on the 22nd day of January, 1970, the said witness returned to the said Grand Jury room and was informed that he had been granted full and complete immunity pursuant to law; that questions were propounded to the said witness, which said questions were pertinent, relevant and material to the said investigation then and there being conducted before the said Grand Jury; a copy of the proceedings before the Grand Jury on January 22, 1970, containing the questions propounded to the witness and his answers thereto being set forth herein as Exhibit "A";

And it further appearing to the satisfaction of this Court that the said witness refused to answer said questions or any other pertinent, relevant and material questions upon the ground that the answer might tend to incriminate him despite the fact that immunity had been duly conferred upon the said witness as hereinabove recited;

And it further appearing to the satisfaction of this Court that thereupon on the 27th day of April, 1970, at the request of the said Grand Jury, the District Attorney applied to this Court at Part 1 thereof before the undersigned for a direction and order overruling the objection of the said witness and for a direction and order that the grant of immunity to the said witness was coextensive with

his privilege against self-incrimination with respect to any and all crimes, transactions, matter or things his testimony may disclose before the said Grand Jury, and that his refusal to answer said questions based upon said privilege against self-incrimination was unwarranted in law, and to further direct and order the said witness to return to the Grand Jury and answer the said questions before the Grand Jury.

Upon such application the witness appeared before the Court in person and by his attorney, and the District Attorney of Kings County and said Grand Jury appeared by DAVID H. KATZ, Assistant District Attorney. After hearing the said attorneys in support of their respective positions, the Court on the day of April, 1970, after due deliberation overruled the claim of privilege against self-incrimination of the said witness, and the Court, thereupon, in open Court, directed and ordered the said witness to return to the said Grand Jury to answer the said pertinent, relevant and material questions. The said witness thereupon in open court, did wilfully disobey the Court's lawful mandate to return to the Grand Jury and answer the pertinent, relevant and material questions.

NOW, on motion of EUGENE GOLD, District Attorney of Kings County, it is ordered and adjudged that the said witness, VITO GRIMALDI by reason of the particular circumstances of his offense hereinabove set forth for his contumacious and unlawful refusal after being sworn as a witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court to return to Grand Jury and testify committed a criminal contempt of Court in the immediate view and presence of the Court and that said contempt was wilful

and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York;

And it is further ordered and adjudged that for the said criminal contempt of court, the said VITO GRIMALDI be imprisoned in the Civil Prison of the City of New York for a term of thirty days and in addition thereto to pay a fine of $250.00 and in the event that the said VITO GRIMALDI shall fail to pay the fine of $250.00 herein assessed against him, that he shall be imprisoned for an additional term of thirty days.

And it is further ordered that the Sheriff of the City of New York or his duly authorized agent is authorized and directed at any time upon written request of the District Attorney of Kings County, to deliver the said witness to a police officer of the City of New York for the purpose of taking him to court or to the office of the said District Attorney or to any other place designated by the District Attorney and thereafter returning the said witness to the said Civil Jail.

And it is further ordered and adjudged that the Sheriff of the City of New York or his duly authorized agent, execute this commitment order and imprison the said VITO GRIMALDI pursuant to this order of commitment. (See Minutes of 4/30/70.)

Enter:

JULIUS HELFAND,
J.S.C.

Dated: Brooklyn, New York
April 30, 1970

Granted: April 30, 1970
ANTHONY N. DURSO
Clerk

APPENDIX C

U.S. Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

APPENDIX D

U.S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

APPENDIX E

U.S. Constitution, Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

APPENDIX F

New York Judiciary Law, Section 750

"A court of record has power to punish for criminal contempt a person guilty of any of the following acts, and no other:

. . . 3. Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory."

APPENDIX G

Grand Jury Proceedings. Kings County, January 8, 1970

VITA GRIMALDI, residing at 74-20 58 Avenue, Elmhurst, New York, having been called as a witness, having been duly sworn, testified as follows:

By Mr. Katz:

Q. Have you previously appeared before this grand jury? A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me under my rights under the Fifth Amendment of the Constitution and the New York State Constitution and for all the reasons stated before the grand jury on a previous appearance.

Q. Mr. Grimaldi, do you have an attorney present outside this grand jury room? A. I respectfully decline to answer on the ground that my answer might tend to incriminate me in violation of my rights under the Fifth Amendment under the Constitution and the New York State Constitution and for all the reasons stated in the grand jury on prior appearances.

Q. Mr. Grimaldi, I am going to inform you of your rights now. When you come before the grand jury you are entitled to certain rights. One of them is the right to have counsel present outside the grand jury room to aid you in answering any question that I put to you. You have the right not to answer if the answer tends to incriminate or degrade you. Under the Federal Constitution of the United States you have the privilege against self-incrimi-

nation which means any questions asked of you which might be incriminating or degrading, you have the right to refuse to answer. Do you understand that? A. Yes.

Q. Do you understand that you have the right to consult with counsel on any question I pose to you? A. Yes.

Q. Also, if you continue to exercise your privilege against self-incrimination, this grand jury has the power to confer immunity on you. It means this: That the grand jury grants you immunity which takes the place of your Fifth Amendment Right; right of privilege against self-incrimination. This means that any answer to a question put to you, which incriminates you, cannot be used against you in any criminal proceeding nor any leads that come from your answers to the questions. In other words, if you admit to a crime, and your answer was honest and responsive to the question, the District Attorney or other law enforcement agencies cannot use that testimony nor any leads from it at all; never prosecuting you for admitting that crime; you cannot be prosecuted in the State of New York, do you understand that? A. I respectfully decline to answer on the grounds that my answer may tend to incriminate me in violation of my rights under the Fifth Amendment under the Constitution and the New York State Constitution and for all the reasons stated to the grand jury on a prior appearance.

Q. Mr. Grimaldi, if I continue to ask questions, would you answer in the same way? A. Yes, sir.

Mr. Katz: I am going to excuse you from this grand jury and make a request that the grand jury vote to grant you immunity.

(The witness leaves the grand jury room.)

Mr. Katz: I respectfully request that this grand jury consider the granting of immunity to this witness.

(At this time the Assistant District Attorney and the stenographer leave the grand jury room.)

(The Assistant District Attorney, stenographer and witness return to the grand jury room.)

Mr. Katz: Mr. Foreman, has the grand jury voted to grant the request of the Assistant District Attorney to confer immunity upon this witness?

The Foreman: By a unanimous vote, yes.

Mr. Katz: The grand jury has agreed to confer immunity upon you. If you so desire, you can consult your attorney as to what immunity means. I am going to explain it to you as simply as possible in layman's terms. In other words, if you testify to a question, your answers can never be used against you in any future criminal proceeding in any court of law. If you admit, for instance, to a burglary, and were questioned about this event here, and you admitted you caused the burglary, you can never be prosecuted for that crime. That is the law in New York State as of today.

Q. Do you understand that you can never be arrested for that crime? Do you understand that? A. Yes.

Mr. Katz: Now, I am going to proceed to ask you a series of questions about the alleged take-over of a crime syndicate in the County of Kings, formally headed by one Joseph Bonanno. There have been

a series of murders and other related crimes by the syndicate and the grand jury believes you may be able to shed light on this through your testimony. You may make any statement that you desire.

The Witness: I'd like to talk to my lawyer again on this.

Mr. Katz: All right. You are excused for a talk with your lawyer.

(The witness leaves the grand jury room to confer with his attorney.)

(The witness returns to the grand jury room after conferring with his attorney.)

The Witness: My attorney would like an adjournment to the 22nd and I would like to discuss it with my attorney.

Mr. Katz: Mr. Grimaldi, you will be granted an adjournment to consult with counsel. However, we are going to proceed on January 22, 1970, and that will be the final day. There will be no further adjournments and you will be compelled to testify at that point. You may tell your attorney that.

Q. Who is your attorney? A. Mr. Newman.

Q. Mr. Newman of Evseroff, Newman and Sonenshine at 186 Joralemon Street in Brooklyn? A. Yes.

Mr. Katz: You are excused.

(Witness excused.)

APPENDIX H

Testimony of Petitioner on January 22, 1970 Before the Kings County Grand Jury

VITO GRIMALDI, residing at 74-20 58th Avenue, Elmhurst, New York, having been recalled as a witness, having been duly sworn, testified as follows:

By Mr. Katz:

Q. Mr. Grimaldi, on your last appearance before this Grand Jury on January 8, 1970, you were granted immunity by this Grand Jury and I believe at that time you refused to answer certain questions. Have you had time—do you have counsel?. Do you have counsel present outside this Grand Jury room? A. Under the advice of counsel I hold to the previous statement I made to the Grand Jury.

Q. You refuse to answer questions on the grounds that it may tend to incriminate you? A. On the advice of counsel I hold to the previous statement I made to this Grand Jury.

Q. Mr. Grimaldi, this Grand Jury is investigating the take over of a crime syndicate headed by Joseph Bonnano; this Grand Jury informed you of your Fifth Amendment privilege against self incrimination afforded to you under the Federal Constitution and New York State Consfitution. Since you have been granted immunity, anything you testify to before this Grand Jury that implicates you in a crime, you cannot be prosecuted for that crime in the State of New York. A. Under the advice of counsel I hold to the previous statement I made to the Grand Jury.

Q. The only two crimes you can be convicted of after being granted immunity is contempt; refusing to answer questions and you can be guilty of civil contempt which means thirty days in jail or $250 fine or both or you can be guilty of criminal contempt, $500 fine or a year in jail or both. The District Attorney here has given you a chance from your last appearance to answer certain questions. I'm going to proceed to ask you questions. Do you know an individual by the name of Frank Mari? A. Under the advice of counsel I hold to my previous statement made.

Q. Do you know an individual by the name of Joseph Bonnano? A. I hold to the previous statement.

Q. Do you know an individual by the name of Paul Sciacca (phonetic spelling)? A. I hold to the previous statement.

Q. Do you know an individual by the name of Vito Grimaldi? A. I hold to the previous statement.

Q. If I continue to ask you questions will you continue to answer in the same manner? A. Under the advice of counsel I hold to the previous statement.

Q. Mr. Grimaldi, at this time I'm going to excuse you from the Grand Jury and the District Attorney will evaluate your testimony of today and your previous appearance before this Grand Jury on January 8 and your attorney will be informed and you will be informed of further legal action if it will be taken by this office. You are excused.

(Witness excused.)

SUPREME COURT, U. S.

SUPREME COURT, U.S.
FILED
OCT 23 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 595

VITO GRIMALDI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1970

No. 595

VITO GRIMALDI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated June 15, 1970, which in turn affirmed an order of the Supreme Court of Kings County, Criminal Term, Part I, dated April 30, 1970, and entered April 30, 1970, which found the defendant to be guilty of criminal contempt under Section 750 of the New York Judiciary Law. The Court of Appeals of the State of New York denied leave to appeal on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Defendant argues that his rights under the United States Constitution relating to his privilege against self-incrimination, to the right to the assistance of counsel and to due process of law were violated.

Statutes

The statute involved is Section 750 of The New York Judiciary Law which provides:

> Power of Courts to Punish for Criminal Contempts
>
> "A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:
>
> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
>
> 2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.
>
> 3. Wilful disobedience to its lawful mandate.
>
> 4. Resistance wilfully offered to its lawful mandate.
>
> 5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Statement of Facts

The petitioner Vito Grimaldi appeared before the Kings County Grand Jury pursuant to a subpoena on January 8, 1970, and was advised by the Assistant District Attorney of his right to refuse to answer. The petitioner asserted his constitutional privilege and was thereupon excused for a short period of time during which the Grand Jury voted to confer immunity upon him.

He was then immediately brought back to the Grand Jury room and advised that the Grand Jury had voted to confer immunity upon him. The matter was then adjourned to January 22, 1970, to allow the petitioner to consult with counsel in the interim. Thereafter, on January 22, 1970, the

petitioner returned to the Grand Jury room. The petitioner then stated that upon the advice of his counsel he would, "Hold to the previous statement made to the Grand Jury", referring to the prior assertion of his constitutional privilege against self-incrimination. The petitioner was informed that he had been granted immunity. The petitioner declined to answer any further questions upon the grounds previously stated and a motion was thereafter made by the District Attorney to punish him for contempt under the Judiciary Law by reason of said refusal to answer.

The matter came on for oral argument before Mr. Justice Helfand sitting at Criminal Term, Part I of the Supreme Court, Kings County. Upon said oral argument, counsel for the defendant pointed out to the Court that the District Attorney had not advised the petitioner that he could be subject to prosecution for perjury based upon any answers he might make if same were alleged to be false. The Court overruled that argument and Judge Helfand ruled after reviewing the minutes of January 8, 1970, that the immunity granted was granted in a proper manner and was not defective. The Court held the petitioner in contempt and imposed a thirty day jail sentence and a fine of $250.00 on April 30, 1970.

The order of Justice Helfand was affirmed by the Appellate Division, Second Judicial Department on June 15, 1970, without opinion. The Court of Appeals of the State of New York denied leave to appeal to that Court on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court. The petitioner was indicted on June 11, 1970, for criminal contempt under section 215.50 subdivision 4 of the Penal Law of the State of New York for refusing to answer questions on January 22, 1970.

ARGUMENT

POINT I

It was not a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello*, 21 N Y 2d 418, 423, although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton*, 265 F. Supp. 27, 38 (S.D.N.Y. 1967); *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D.N.Y. 1958); *People* v. *Ianniello*, 21 N Y 2d 418, 423; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban*, *supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less

danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officer's misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

In re Groban, *supra* at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney

represents more than one witness during a particular investigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 384 U.S. 436 (1966); *Miranda* v. *Arizona*, *supra*; *United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) require the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolf-*

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967). In a recent case, *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

POINT II

The petitioner was fully and fairly informed as to the scope of the immunity granted to him.

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> " . . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding, but he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or

evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

After examining the statute one can see that it grants "transactional immunity." *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Matter of Gold* v. *Menna*, 25 N Y 2d 475 (1969).

The petitioner on January 8, 1970, appeared before the Grand Jury and the petitioner was explained what immunity means and what immunity entails. On page 22 of the Grand Jury minutes of January 8, 1970 (appendix G of petitioner's brief), the petitioner was told by the Assistant District Attorney "if you admit to a crime, and your answer was *honest* and responsive to the question, the District Attorney or other law enforcement agencies cannot use that testimony nor any leads from it at all; never prosecuting you for admitting that crime."

The word honest means creditable according to Funk & Wagnall's New Desk Standard Dictionary page 380 (1953) and creditable means that one can be believed. Any reasonable man upon hearing the Assistant District Attorney's statement would know that he must tell the truth to avoid possible future legal action such as being charged with perjury.

POINT III

It was not a violation of the petitioner's rights under the Fifth Amendment to indict him for criminal contempt before he had exhausted all his appeals from the judgment of summary contempt.

The petitioner was afforded due process and all his rights were safeguarded by the District Attorney and his own legal counsel.

The petitioner was adjudicated in contempt by Judge Helfand on April 30, 1970. The petitioner did not notify Judge Helfand nor the District Attorney that he wished to testify before the Grand Jury to purge himself of the contempt adjudication of April 30, 1970. The petitioner had time from April 30, 1970, to June 10, 1970, to request an appearance before the Court in order to purge the contempt adjudication under Section 750 of the Judiciary Law of the State of New York. Since the petitioner did not make an attempt to try and purge himself of the summary contempt before Judge Helfand this is not a justiceable issue to be raised by the petitioner, because the petitioner did not suffer any legal injury. The petitioner had adequate time, before being indicted for criminal contempt under section 215.50 of the Penal Law of the State of New York, to purge himself for disobeying the lawful mandate of the Court. This was not the intention of the petitioner. Even if the petitioner wished to purge himself of the contempt he committed before Judge Helfand and he wished to obey the mandate of the Court, the petitioner's request to purge need not be accepted by the trial judge. The law in New York is stated in *Typothete of New York* v. *Typographical Union No. 6*, 138 A.D. 293, 295

> "This application, therefore, is in effect one to be allowed to purge themselves of their contempt by respondents, is addressed to the discretion of the Court which alone had power to punish for the contempt and to allow its being purged, and whose discretion and authority were in nowise destroyed or abridged or abridged by the affirmance upon appeal of its own determination. Having been satisfied that it was proper that the full enforcement of its own mandate should be stayed, and no valid reason appearing why its discretion should not be exercised to that end, the Court was within its rights in so ordering."

Even if the petitioner made a request to purge, the trial judge need not accept this request. Here the petitioner had at least two months before being indicted to make a request which he had not done. The Court should not try and surmise what might have resulted if the petitioner requested to purge himself. This issue has not arisen and the Court should not consider hypothetical cases which may or may not result in legal injury. Judge Helfand does not have to accept the request to purge and the petitioner would then have to serve his sentence.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
October 23, 1970

Respectfully submitted,

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